

SUPREME COURT NO. 86124-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Dependency of K.D.S., a Minor

STATE OF WASHINGTON, DSHS,

Respondent,

v.

DEREK GLADIN,

Petitioner,

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUES

1. Where the State proves there is little likelihood that conditions will be remedied so the child can be returned to the parent in the near future under RCW 13.34.180(1)(e), does it necessarily follow in all cases that the State has sufficiently proven that continuation of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home under RCW 13.34.180(1)(f)?

2. Did the State fail to prove by clear, cogent, and convincing evidence that continuation of appellant's legal relationship with his daughter clearly diminished her prospects for early integration into a stable and permanent home?

B. SUPPLEMENTAL STATEMENT OF THE CASE

K.D.S. was born on July 28, 1995. RP 17. Appellant Derek Gladin is K.D.S.'s father and Elizabeth Sleasman is her mother. RP 17. K.D.S. was taken into custody on November 23, 2002, after Sleasman engaged in a high speed chase with K.D.S. in the car. RP 17, 75. At that time, Gladin was living in Alabama. RP 19-20. On January 6, 2003, K.D.S. was found dependant as to Sleasman based on a finding of neglect. CP 5. On August 29, 2003, a

dependency was established as to Gladin because he was not able to meet K.D.S.'s significant special needs. CP 5; RP 74.

K.D.S. suffers severe developmental delays and mental health issues which manifest in extreme behavioral problems.¹ K.D.S. has been diagnosed with fetal alcohol exposure, attention deficit hyperactivity disorder, post traumatic stress disorder, communication disorder, mental retardation, oppositional defiance disorder, and a mood disorder. RP 103, 292. Although K.D.S. was 14 years old at the time of the termination hearing, her cognitive function was akin to that of a preschooler. RP 250, 262.

As a result, K.D.S. acts out aggressively (physically and verbally) when she is frustrated, engages in highly sexualized and inappropriate behavior, self injures, and threatens to kill others. RP 104, 295. She has been hospitalized several times for psychiatric treatment -- sometimes needing to stay up to 180 days. RP 91, 102, 290, 300. K.D.S.'s school has undertaken considerable accommodations to keep her, the other students, and the staff safe. RP 247-49. The school purchased protective gear and built a special time-out room with a one-way locking door. RP 252-53.

¹ The trial court found Gladin was not responsible for causing these circumstances. RP 541.

When K.D.S. escalates, the staff must clear all the other students from the room while 2 or 3 staff members put on the protective gear and attempt to restrain her. RP 257, 259. K.D.S. is then locked in the time-out room and observed through a window until she can de-escalate. RP 252-53. The school staff has suffered scratches, bites, bloody noses, fat lips, and kicks to the head. RP 260.

K.D.S.'s needs are extreme. RP 106. She requires an institutional home without roommates, multiple caregivers, and round-the-clock staffing. RP 105, 266, 297, 302. The institutional staff has had to develop an elaborate safety plan for protecting K.D.S. and themselves when she is out of control. RP 298-300. This plan includes attempting to restrain K.D.S. and, if that proves unsuccessful, leaving the house and observing her through the windows. RP 299. As a last resort, the staff is directed to call 911 for help.² RP 300.

K.D.S.'s needs have proven too much for her relatives and the one foster home she was placed in. RP 274, 408. Throughout the dependency, K.D.S. had to change residency fourteen times.

² The police have been called and have had to restrain K.D.S. with handcuffs. RP 301.

RP 143. Given K.D.S.'s extreme behavior, her social worker did not see K.D.S. ever being able to live independently. RP 106.

Despite this instability, K.D.S. remained for several years at the Right Start group home in Arlington (her longest placement). While K.D.S. was at Right Start, Gladin participated in numerous visits with her. K.D.S. was excited to see her father and asked to see him on several occasions. The reports document that Gladin was appropriate, maintained a patience and calm, and successfully redirected his daughter to avoid escalating behavior. They enjoyed their time together.³ RP 33, 36, 123-24, 147- 72, 186, 273, 347-65.

Unfortunately, the Department had to remove K.D.S. from Right Start after discovering the facility had violated the Department's policies designed to protect K.D.S. from sexual exploitation. RP 33, 120, 273. As a result, K.D.S. was placed at SL Start Children's Home in Spokane.⁴ RP 114. The Department was aware the transfer would present visitation challenges because

³ Based on these facts, the trial court concluded Gladin's visits with his daughter were not harmful and stated it would have ordered a continuation of the dependency with visits if it had the authority to do so. RP 543-44.

⁴ At the termination trial, an SL Start representative stated that institution was committed to providing for K.D.S.'s care permanently. RP 329. They also had made this known to the Department. RP 118-19.

Gladin lived in western Washington, where there were better employment prospects. RP 115, 290, 486. Not surprisingly, visitation became problematic after the move, although Gladin continued to show interest in contact with K.D.S. RP 35-38, 88.90, 100-01.

Despite the ongoing dependency, K.D.S. was cleared for adoption in April 2008. RP 409. K.D.S. was listed with the Northwest Adoption Exchange Network and specifically presented twice. RP 106. Although one family showed some initial interest, they decided to adopt a disabled child with far less challenges than K.D.S. RP 106, 336-39.

On October 19, 2009, the State moved to terminate Gladin's parental rights. CP 112-62. At the end of the termination hearing, the trial court concluded, Gladin was not in a position to meet his daughter's significant daily needs and no amount of services could change that. RP 77-81, 540-41. However, the trial court also stated that it believed there was no chance K.D.S. would be adopted and she would remain in a home such as RL Start for the rest of her life. RP 542, 543. Moreover, the trial court found there was only a small (5%) chance K.D.S. would find a permanent, non-institutional home even if termination occurred. RP 543-44; CP 8.

Accordingly, the court concluded "[K.D.S.] is in as in as stable and permanent home now as she'll ever be in." RP 544.

Although the trial court believed the ideal situation would be to continue of the dependency and K.D.S.'s placement at RL Start with occasional supervised parental visits, it did not believe it had the power to order this. RP 543-46. Instead, it entered a termination order. CP 8-9. Gladin appealed, but Division I affirmed the order. Commissioner's Ruling (attached as an Appendix). He then petitioned this Court, which accepted review.

C. SUPPLEMENTAL ARGUMENT

- I. UNDER THE PLAIN LANGUAGE OF THE TERMINATION STATUTE, A FINDING THAT RCW 13.34.180(1)(f) IS MET DOES NOT NECESSARILY FOLLOW FROM A FINDING THAT THE STATE HAS PROVED RCW 13.34.180(1)(e).

It is well established that parents have a fundamental liberty interest in the care and custody of their children. U.S. Const. amend. V, XIV; Wash. Const. art. I, § 3. The State may interfere with this interest "only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998). To satisfy these constitutional due process considerations, the Legislature has set forth six

statutory factors -- all of which must be sufficiently proved before a trial court may order the termination of parental rights.⁵ In re Welfare of C.B., 134 Wn. App. 336, 344, 139 P.3d 1119 (2006).

The primary issue presented in this case stems from this Court's consideration of RCW 13.34.180(1)(f) in In re Dependency of J.C., 130 Wn.2d 418, 427, 924 P.2d 21 (1996). J.C. was one of four children who were severely neglected due to their mother [K.C.]'s substance abuse. Id. at 420-21. Despite K.C.'s sobriety at the time of the termination hearing, she had not complied with after-care programs and remained unable to care for her children's psychological needs. Id. at 422-23. K.C.'s visits with her children were destabilizing, resulting in significant psychological set-backs for the children. Id. at 422; In re Dependency of J.C. [II], 78 Wn. App. 143, 149, 896 P.2d 720 (1995) (providing more detailed

⁵ The following two statutory elements are at issue here:

(e) there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future ... and

(f) Continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home.

RCW 13.34.180(1).

information about how the visits psychologically destabilized the children). K.C.'s idea of discipline was to threaten the children that if they did not behave, "she was going to go out and get drunk or go out and get high[.]" Id. The children were very upset by this. Id.

After the trial court terminated her parental rights, K.C. appealed and won. J.C. II, 78 Wn. App. at 152-53. The Court of Appeals concluded the State had not made an adequate showing under former RCW 13.34.180(5).⁶ Id. The State asked this Court to review that decision. J.C., 130 Wn.2d at 420.

Looking to the termination statute, this Court outlined its analysis as follows:

Our focus is on RCW 13.34.180(5) because we are satisfied that substantial evidence in the record supports the juvenile court's finding that "services ordered under RCW 13.34.130 have been offered or provided." RCW 13.34.180(4). ... Insofar as the finding required by RCW 13.34.180(6), that continuation of the parent-child relationship diminishes the child's prospects for early integration into a stable and permanent home, such a finding necessarily follows from an adequate showing of the allegation made pursuant to RCW 13.34.180(5).

Id. at 427.

⁶ RCW 13.34.180(1)(e) and (1)(f) were formerly codified as RCW 13.34.180(5) and (6).

As written, it is unclear whether this Court held RCW 13.34.180(6) necessarily follows from a finding of RCW 13.34.180(5) **in every case**, or whether it held that such a finding necessarily followed under the specific facts presented in J.C.⁷ Unfortunately, J.C. offers scant analysis from which to resolve this ambiguity.

J.C.'s ambiguous application of RCW 13.34.180(6) rests at the heart of this case. Citing J.C., Division I concluded that when a trial court finds there is little likelihood that conditions will be remedied so that the child can be returned to a parent in the near future under RCW 13.34.180(1)(e), it necessarily follows in all cases that the State has met its burden under RCW 13.34.180(1)(f).⁸ Appendix at 8; see also, In re P.P.T. 155 Wn.

⁷ Under the facts of J.C. (as cited above), the allegation that K.C. was unlikely to remedy her psychologically destabilizing effect on her children did in fact support a conclusion that continuation of their legal relationship clearly diminished the prospects that the children would integrate into a stable and permanent home. See, e.g., Dependency of Esgate, 99 Wn.2d 210, 214, 660 P.2d 758 (1983) (holding final termination factor supported by evidence showing continuation of the parent/child relationship created feelings of insecurity and instability in the child).

⁸ The trial court explained that J.C.'s holding was ambiguous to it, but ultimately concluded that in Gladin's case, a finding under subsection (f) did not necessarily follow from a finding under subsection (e). RP 541.

App. 257, 268, 229 P.3d 818 (2010) (same). Petitioner disagrees for the following two reasons: (1) a subsequent case indicates J.C.'s holding is limited to its facts; and (2) the Court of Appeal's application of J.C. renders superfluous a significant portion of the termination statute.

This Court's holding in In re Dependency of K.S.C., 137 Wn.2d 918, 976 P.2d 113 (1999), indicates J.C.'s consideration of RCW 13.34.180(6) should be read as limited to the facts of that case. In K.S.C., the child's mother challenged the sufficiency of the evidence under RCW 13.34.180(6), but she did not properly raise a challenge under RCW 13.34.180(5). This Court refused to review any argument regarding RCW 13.34.180(5). Id. at 926, n.3. Hence, the posture of the case as it came up for review by this Court was that the State had proven the allegations made under RCW 13.34.180(5).

Under Division I's reading of J.C., any further review would have been unnecessary, because a finding under RCW 13.34.180(6) would have necessarily followed from the fact RCW 13.34.180(5) had been established. Yet, this Court went on to consider whether the State had met its burden under RCW 13.34.180(6). As such, this Court must have concluded that proof

of RCW 13.34.180(6) does not inevitably flow from proof of RCW 13.34.180(5). Accord, Esgate, 99 Wn.2d at 214 (analyzing whether the State had met its burden under subsection (6), despite the fact it had already found the State's burden under subsection (5) had been met). Thus, K.S.C. strongly supports petitioner's position that J.C.'s holding regarding RCW 13.34.180(6) was limited to the facts of that case.

Petitioner's reading of J.C. is also consistent with the longstanding rule of statutory construction that all language within a statute must be given effect so that no portion is rendered meaningless or superfluous. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 1231 (1999). If J.C. applies as Division I suggests, RCW 13.34.180(1)(f) is, in effect, rendered meaningless because it will automatically be established by proof of the previous statutory element. This certainly cannot be what the Legislature intended when writing the statute or what this Court intended in J.C.

For the reasons stated above, this Court should clarify its holding in J.C. and reject Division I's expansive reading of the case – a reading which renders an entire statutory element meaningless.

II. THE STATE FAILED TO MEET ITS BURDEN
UNDER RCW 13.34.180(1)(f).

Before parental rights may be terminated, RCW 13.34.180(1)(f) must be proved by clear, cogent, and convincing evidence. In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). Clear, cogent and convincing evidence exists only "when the ultimate fact in issue is shown by the evidence to be 'highly probable.'" In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). The State failed to make such a showing.

It is well established that the main focus of RCW 13.34.180(1)(f) "is the parent-child relationship and whether it impedes the child's prospects for integration, not what constitutes a stable and permanent home." K.S.C. 137 Wn.2d at 927. As a first step in considering RCW 13.34.180(1)(f), the trial court must assess whether the State has proved that the child has legitimate prospects for a more stable and permanent home. If no real prospects exist for the child, it logically follows that continuation of the parent-child does not diminish any prospects.

To show a child has legitimate prospects, the State need not show a child is guaranteed adoption or that there is a stable and

permanent home awaiting the child after termination.⁹ However, it does need to produce clear, cogent and convincing evidence that real integration **prospects** exist.

Although the Legislature has not set forth any particular criteria for what need be shown, the plain language of the statute provides a guide. The term “prospects” means: “an apparent probability of advancement, success, profit, etc.”¹⁰ In turn, “probability” means “a strong likelihood or chance of something.”¹¹ Hence, under the plain language of 13.34.180(1)(f), the State must establish that there is an apparent likelihood the child will find a more stable or permanent home as a result of termination.¹²

⁹ See, K.S.C. 137 Wn.2d at 927 (explaining the State need not show stable home awaits); Esgate, 99 Wn.2d at 214 (explaining State need not prove child will be adopted).

¹⁰ prospects. Dictionary.com. Dictionary.com Unabridged. Random House, Inc. <http://dictionary.reference.com/browse/prospects> (accessed: January 15, 2012).

¹¹ probability. Dictionary.com. Collins English Dictionary - Complete & Unabridged 10th Edition. HarperCollins Publishers. <http://dictionary.reference.com/browse/probability> (accessed: January 15, 2012).

¹² This burden will often be harder to meet when the child is a teenager or has special needs, as such children are “considered very hard to adopt.” O'Donnell, R., supra, at 363. K.D.S. falls into both these categories.

The question of whether prospects exist for a child will be most significant in cases where there is a real risk the child could become a legal orphan as a result of termination. "Legal orphans' are children who have been legally freed from their parents still living but who have not been adopted and are unlikely ever to be adopted."¹³ The problems these children face are well documented and a growing public concern.¹⁴ By requiring the State show the

¹³ Kirstin Andreasen, Comment, Eliminating the Legal Orphan Problem, 16 J. Contemp. Legal Issues 351, 351 (2007) (citation omitted).

¹⁴ One legal scholar summarized the circumstances legal orphans face as follows:

Unfortunately, research suggests that the outlook for the teens who exit or "age out" of foster care without a permanent home or a meaningful adult relationship is bleak. Moreover, "poorer-outcomes--both in terms of psychological well-being and subsequent involvement with the juvenile and criminal justice systems--have been associated with the absence of quality adult relationships in young people's lives." These teens are more likely to face homelessness, joblessness, drug addiction, early pregnancy, mental health problems, and prison time. Yet nationally, nearly 25,000 young people age out of foster care every year without the support of a family or caring adult legally committed to helping them address these challenges and make a successful transition to adulthood.

Randi J. O'Donnell , A Second Chance For Children And Families: A Model Statute To Reinstate, 48 FAMCR 362,363 (April, 2010)

child has real prospects for a stable and permanent home, the Legislature has embedded in the termination a safeguard against the unfortunate creation of legal orphans.

The record shows K.D.S. had no legitimate prospects for early integration into a stable and permanent home and was at significant risk of becoming a legal orphan as a result of termination. K.D.S.'s prospects for anything other than her institutional home are not apparent in this record. K.D.S. was not shown to be a candidate for relative placement or a guardianship. RP 274, 408. Due to her extreme special needs, she was shown to be neither specifically nor generally adoptable. Even state's witnesses concluded K.D.S.'s prospects for a permanent home outside of SL Start were bleak. RP 106, 190-91.

Indeed, the trial court was convinced there was no chance K.D.S. would be adopted and concluded "[K.D.S.] is in as in as stable and permanent home now as she'll ever be in." RP 544-45.

(footnotes omitted); see also, Megan K. Holbrook, Case Note, The Wrong Side of the Coin--Policy, Permanency and the Problem of Legal Orphans in Wyoming; In re A.D., D.D., K.D. v. Wyoming Department of Family Services, 151 P.3d 1102 (Wyo. 2007), 8 WYO. L. REV. 139, 167-60 (2008).

This is a clear indication the State failed to prove the existence of real integration prospects.

The State also failed to produce sufficient evidence that Gladin's legal relationship clearly diminished any prospects K.D.S. might theoretically have. Although the social worker testified K.D.S. was theoretically adoptable and that her chances for adoption would be greater if Gladin's parental rights were terminated (RP 107), her opinion was merely predicated on the notion that people in general are more willing to adopt when a child is legally free. In fact, when the trial court asked this social worker to render a specific opinion as to how likely it is for a 14-year-old girl with K.D.S.'s needs to be adopted, the social worker admitted she was hopeful but really had no idea what was the likelihood for adoption.¹⁵ RP 410.

Although the trial court's findings echo the social worker's generalized notion regarding the increased adoption prospects of children who are legally free (CP 8), such a finding does not establish the State sufficiently proved diminished prospects. Instead, it more aptly speaks to theoretical possibilities. See, In re T.R., 108 Wn. App. 149, 166, 29 P.3d 1275 (2001) (explaining that

¹⁵ The state failed to call an adoption expert. RP 191, 489-90.

when it comes to dependency matters, "theoretical possibilities are not enough"). The relevant legal inquiry is not whether in theory K.D.S. may likely be adopted if she were legally free – the relevant legal inquiry is whether the State sufficiently proved there was a strong likelihood K.D.S. would be able to integrate into a more stable or permanent home, and whether continuation of the parent-child legal relationship diminished this likelihood. Such proof was not produced.

In the end, the trial court concluded K.D.S. had only a small (5%) chance of finding a permanent home even if termination occurred. RP 543-44. Assuming arguendo the trial court's quantification of K.D.S.'s prospects was proven,¹⁶ this evidence was insufficient to meet the State's burden under RCW 13.34.180(1)(f). It is not enough for the State to show a child's prospects might be slightly improved by the termination of the parent-child relationship. Instead, the State must show that a

¹⁶ The evidentiary basis for the trial court's quantification of K.D.S.'s prospects is not apparent in this record as there was no expert that could quantify K.D.S.'s prospects in any meaningful way. Hence, the number appears speculative at best.

child's prospects are "clearly"¹⁷ diminished by continuation of the parent-child relationship. RCW 13.34.180(1)(f). This was not shown.

Finally, the State failed to procure a finding that Gladin's continued presence in K.D.S.'s life clearly diminished her psychological ability to integrate into a stable or permanent home. In some cases, the State might meet its burden under RCW 13.34.180(1)(f) if it can show that the parent's presence is so damaging to the child's psychological sense of stability that it undoubtedly diminishes the child's prospects for early integration. E.g., J.C., 130 Wn.2d 422-23, 427. However, this is not one of those cases.

The trial court expressly stated it was convinced Gladin was not a danger to his daughter during visits and, instead, focused its decision to terminate on his inability to parent K.D.S. on a daily basis due to her exceptional needs. RP 540-41, 543-44. There is no contrary written finding regarding visitation. In fact, the trial

¹⁷ The use of the word "clearly" is entitled to significance and weight. See, State ex rel. Dole v. Kirchner, 182 Kan. 622, 322 P.2d 759 (1958). The word "clearly" means "1: in a clear manner 2: of something asserted or observed: without doubt or question." Webster's Third New Int'l Dictionary 420 (unabridged ed. 2002); see also, State v. Edwards-Peecher, 218 Or. App. 311, 319, 179 P.3d 746 (2008).

court believed the ideal situation would be to continue the dependency and K.D.S.'s placement at RL Start, but with occasional supervised parental visits. RP 543-44. Thus, the trial court did not view Gladin's continued contact with his daughter as psychologically harmful.

In sum, although the record adequately establishes that neither Gladin nor any other single person can meet K.D.S.'s extraordinary needs,¹⁸ this does not necessarily mean Gladin's continued legal relationship with his daughter clearly diminishes her prospects for integrating into a stable and permanent home. See, In re Welfare of S.V.B. 75 Wn. App. 762, 775, 880 P.2d 80 (1994) (reversing termination order where parents were unfit to care for children on daily basis but where continuation of the parent-child relationship did not jeopardize their permanent placement).

As shown above, the State failed to meet its burden under RCW 13.34.180(1)(f). Consequently, this Court should reverse the termination order and re-established the dependency.

¹⁸ Gladin has not challenged the trial court's finding that no single person is capable of meeting K.D.S.'s needs because she requires institutional care with multiple, professional care givers. RP 538.

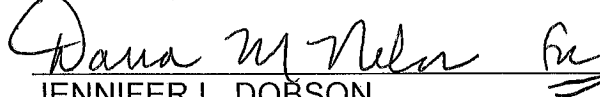
D. CONCLUSION

This Court should hold that a finding that RCW 13.180(1)(f) does not necessarily follow from a finding the State has proved RCW 13.34.180(1)(e). Additionally, this Court should reverse the termination order and remand for reinstatement of the dependency, on the ground the State failed meet its burden under RCW 13.34.180(1)(f).

DATED this 27th day of January, 2012.

Respectfully submitted,

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STATE OF WASHINGTON,

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) SUPREME COURT NO. 86124-2
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF JANUARY 2012 A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JANUARY 2012.

x Patrick Mayovsky